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FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6687

DATE COMPLAINT FILED: Nov. 2, 2012

DATE OF NOTIFICATION: Nov. 9, 2012

DATE OF LAST RESPONSE: Dec. 28, 2012

DATE ACTIVATED: Jan. 22, 2013

EXPIRATION OF STATUTE OF LIMITATIONS:
Apr. 3, 2017

COMPLAINANT:

Joseph Farah
WorldNetDaily, Inc.

RESPONDENTS:

Obama for America and Martin Nesbitt in his
official capacity as treasurer

**RELEVANT STATUTES:
AND REGULATIONS**

2 U.S.C. § 434(b)(3)
2 U.S.C. § 441b(a)
2 U.S.C. § 441e(a)
2 U.S.C. § 441f
11 C.F.R. § 103.3(b)
11 C.F.R. § 110.20

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: N/A

I. INTRODUCTION

The Complaint alleges that Obama for America and Martin H. Nesbitt in his official capacity as treasurer ("OFA") violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by soliciting and accepting contributions from foreign nationals.¹ As support for the allegation, the Complaint cites to news articles reporting on alleged instances in which OFA accepted contributions in 2012 from individuals who were foreign nationals.² In addition, the

¹ Compl. at 1 (Nov. 2, 2012).

² *Id.* at 2-3.

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1 Complainant alleges that he and his staff at WorldNetDaily, Inc. ("WND.com") successfully
2 made contributions to OFA totaling \$23 using a fictitious name and address linked to a foreign
3 national.³

4 OFA denies that it knowingly solicited, accepted, or received prohibited contributions
5 from foreign nationals.⁴ OFA contends that its vetting and compliance procedures were
6 consistent with those that the Commission found sufficient in MURs 6078/6108/6139/6142/6214
7 (Obama for America) (2008 cycle).⁵ OFA also states that it either rejected or refunded all of the
8 contributions referenced in the Complaint.⁶

9 Based on the available information, we recommend that the Commission: (1) find no
10 reason to believe that OFA violated 2 U.S.C. § 441e(a)(2) by accepting or receiving a foreign
11 contribution; (2) dismiss the allegation that OFA violated 2 U.S.C. § 441e(a)(2) by soliciting a
12 contribution from a foreign national; (3) find no reason to believe that OFA violated 11 C.F.R.
13 § 103.3(b) by failing to adequately examine illegal contributions; (4) find no reason to believe
14 that OFA violated 2 U.S.C. § 434(b)(3) by failing to provide identifying information for
15 contributors; and (5) find no reason to believe that OFA violated 2 U.S.C. § 441f by knowingly
16 accepting a contribution in the name of another.⁷

³ *Id.* 3-4.

⁴ Resp. at 1 (Dec. 28, 2012).

⁵ *Id.* at 2.

⁶ *Id.* at 4-5.

⁷ With respect to the Complainants, we recommend that the Commission take no action with regard to their apparent violation of 2 U.S.C. § 441f by making contributions of \$23 in the name of another.

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1 **II. FACTUAL BACKGROUND**

2 The Complaint alleges that OFA violated the Act by "soliciting, processing, accepting
3 and confirming contributions from foreign nationals and non-U.S. citizens."⁸ The Complaint
4 attaches a report issued by the Government Accountability Institute ("GAI") and news articles
5 that allege a lack of security measures incorporated into OFA's online contribution system.⁹ The
6 GAI Report contends that foreign contributors could likely make contributions because OFA's
7 website failed to use industry standard, anti-fraud credit card security measures when processing
8 contributions.¹⁰

9 The Complainant also provides materials that claim OFA solicited and received
10 contributions from foreign nationals.¹¹ One individual published a claim that OFA "processed" a
11 \$5 contribution he made under a false name with a Russian address, which OFA would have
12 accepted had the contributor's bank not terminated the transaction.¹² The materials also include
13 a claim that a British citizen, Chris Walker, made two \$5 donations to OFA using an address in
14 London, England.¹³ Other articles claim that a British journalist, Mike McNally, made three

⁸ Compl. at 1.

⁹ See, e.g., GAI, *America the Vulnerable: Are Foreign Online Campaign Contributions Influencing U.S. Elections?* (Sept. 26, 2012) (Attachment 8 to the Complaint) ("GAI Report"); Aaron Klein, "Bin Laden" Solicits Foreign Donors on Obama's Website, WND.COM, <http://www.wnd.com/2012/11/bin-laden-solicits-foreign-donors-on-obamas-website/> (Nov. 1, 2012) (Attachment 11 to the Complaint); Devin Dwyer, *Group Warns of Foreign, Fraudulent Donors to Obama Campaign*, ABC NEWS (Oct. 9, 2012), <http://abcnews.go.com/blogs/politics/2012/10/group-warns-of-foreign-fraudulent-donors-to-obama-campaign/> (Attachment 4 to the Complaint).

¹⁰ See GAI Report at 52. The GAI Report does not provide any examples of foreign contributions that were actually made to OFA the 2012 election.

¹¹ See, e.g., GAI Report at 52-79; Klein *supra* note 9.

¹² See Erick Erickson, *I Donated to Barack Obama*, <http://www.redstate.com> (Oct. 8, 2012) (Attachment 5 to the Complaint).

¹³ See Joel Gehrke, *Obama Camp Blocks Donations from China*, WASH. EXAMINER (Oct. 25, 2012) (Attachment 7 to the Complaint).

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1 contributions totaling \$25 using fictitious addresses.¹⁴ Given these reports, the Complainant
2 states that he and his news staff sought to "investigate" OFA's fundraising practices by using
3 "bogus names, addresses, and . . . a foreign (Pakistani) internet protocol (IP) address" to make
4 contributions to OFA.¹⁵ A WND.com reporter made three online contributions using a
5 disposable credit card¹⁶ and totaling \$23 to OFA under the name "Osama bin Laden" and
6 provided the address "911 Jihad Way, Abbattabad, CA 91101."¹⁷ The reporter described his
7 occupation as "Deceased Terror Chief" and his employer as "Al-Qaida."¹⁸ The Complaint adds
8 that after making these contributions, OFA sent solicitations to osama4obama@gmail.com, the
9 email address that the Complainant submitted in connection with his allegedly foreign-sourced
10 contribution.¹⁹

11 The Complaint also claims that OFA solicited foreign contributions through a "Bin
12 Laden" page posted on OFA's official website.²⁰ During the 2012 election cycle, OFA promoted
13 its "Grassroots Fundraising" platform online, which allowed volunteers to set up their own
14 fundraising pages on OFA's website and seek support from friends and family for President

¹⁴ See John Hayward, "Osama Bin Laden" Donates to the Obama Campaign, HUMAN EVENTS (Oct. 30, 2012), <http://www.humanevents.com/2012/10/30/osama-bin-laden-donates-to-the-obama-campaign/> (Attachment 10 to the Complaint); Mike McNally, *How the Obama Campaign Is Illegally Accepting Donations from Foreign Citizens*, PJ MEDIA (Oct. 25, 2012), <http://pjmedia.com/tatler/2012/10/25/how-the-obama-campaign-is-illegally-accepting-donations-from-foreign-citizens/>. Although the Hayward article refers to McNally's "complaint" to the Commission, we have no record that McNally filed a formal complaint under 2 U.S.C. § 437g. Rather, in a separate article, McNally writes that he contacted a Commission spokesperson about his contributions and was advised that he had the option to file a complaint. See Mike McNally, *Part Two: Obama Campaign Stays Silent on Foreign Donors Scandal*, PJ MEDIA (Oct. 25, 2012), <http://pjmedia.com/tatler/author/mikemcnally/>.

¹⁵ Compl. at 3.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 4; Aaron Klein, *Obama Accepts "Osama Bin Laden" Donations*, WND.COM, <http://www.wnd.com/2012/10/obama-accepts-osama-bin-laden-donations/> (Oct. 29, 2012) (Attachment 9 to the Complaint).

²⁰ Compl. at 4.

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1 Obama's campaign.²¹ Based upon information submitted with the Complaint, it appears that
2 Complainants used the Grassroots Fundraising platform to create a web page soliciting
3 contributions for OFA.²² This web page displays a picture of Osama Bin Laden with the
4 following statement: "This campaign will be funded by the many holy foreign donors like you
5 and me — fighting for change we can believe in."²³ According to the article, a donor used the
6 name "Bin Laden" to contribute \$3 with a disposable credit card through the webpage.²⁴ The
7 Complaint concludes that by allowing such a webpage to be posted on OFA's website, OFA "is
8 more concerned with fundraising than abiding by federal law."²⁵

9 Based upon the alleged ease with which foreign nationals could make contributions to
10 OFA, the Complaint argues that OFA should disclose the names of those who contributed less
11 than \$200.²⁶ The Complaint therefore requests that the Commission conduct an investigation
12 and a full audit of OFA.²⁷

13 OFA responds that in 2012 it used compliance procedures similar to those considered in
14 MURs 6078/6090/6108/6139/6142/6214 (Obama for America), where the Commission

²¹ See *How to Set Up Your Own Web Page on Barackobama.com*, <https://www.youtube.com/watch?v=TbMXNBGFHUY>; Katherine Boyle, *NYC Gay Bar Hosts Obama Fundraiser*, WASH. POST (Sept. 9, 2012) (describing the Obama campaign's on-line fundraising efforts).

²² See Klein *supra* note 9. This article states that "'Bin Laden's' page was set up by WND staff on Tuesday as a test after media reports described the ability of foreigners to donate to the Obama campaign." *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Compl. at 4.

²⁶ According to the Complaint, approximately one-third of the contributions raised by OFA in 2012 came from donors who gave less than \$200, and requiring OFA to identify the donors of such contributions would reveal the true sources of the contributions. *Id.* at 4.

²⁷ *Id.* at 4-5.

1 dismissed similar allegations.²⁸ The Response states that OFA examined all contributions it
2 received, whether received by mail or online, for "evidence of illegality."²⁹ All online
3 contributors were required to affirm their U.S. citizenship or permanent legal residence in the
4 U.S.³⁰ OFA required that contributors living abroad provide a valid U.S. passport number before
5 making a contribution and subsequently requested a copy of the passport.³¹ For individuals who
6 made contributions at events held outside the U.S., OFA requested that they provide a copy of a
7 valid U.S. passport and submit a contribution form confirming that they were a U.S. citizen or
8 legal resident.³² If a contributor did not comply with the request for a copy of a valid passport,
9 OFA promptly refunded the contributor's contribution.³³ In addition, OFA conducted automatic
10 searches of its contributor database to identify contributions associated with a foreign address
11 and non-U.S. email addresses.³⁴ Finally, OFA screened all online credit card contributions that
12 originated from a foreign IP address and requested a copy of the contributor's passport if
13 questions regarding the contributor's citizenship arose.³⁵

14 Although the Complaint identifies nine contributions that OFA allegedly received from
15 foreign nationals, OFA argues that the Complaint provides no evidence indicating that OFA

²⁸ Resp. at 1-2. OFA also states without explanation that it implemented "enhanced procedures" for 2012. *Id.* at 2. See also Factual & Legal Analysis (F&LA) at 4-6, MUR 6078/6090/6108/6139/6142/6214 (Obama for America) (describing the procedures used by OFA during the 2008 cycle to screen online contributions).

²⁹ Resp. at 1-2 (citing 11 C.F.R. § 103.3(b)).

³⁰ Resp. at 2-3.

³¹ *Id.* at 3.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ *Id.*

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1 knowingly accepted contributions from foreign nationals.³⁶ Rather, OFA states that its vetting
2 and compliance procedures successfully identified the suspicious contributions, which it rejected
3 or refunded.³⁷

4 III. LEGAL ANALYSIS

5 A. Foreign National Contributions

6 The Act and Commission regulations prohibit a foreign national from making, directly or
7 indirectly, a contribution or donation in connection with an election, and prohibits a person from
8 soliciting, accepting, or receiving a contribution or donation from a foreign national.³⁸

9 Commission regulations clarify that a person violates section 441e if he or she *knowingly*
10 solicits, accepts, or receives a contribution from a foreign national.³⁹ A person “knowingly”
11 accepts a prohibited contribution from a foreign national when the person: (1) has actual
12 knowledge that the source of the funds solicited, accepted, or received is a foreign national; (2) is
13 “aware of facts that would lead a reasonable person to conclude that there is a substantial
14 probability that the source of the funds solicited, accepted or received is a foreign national;” or
15 (3) is aware of facts that would lead a reasonable person to inquire as to whether the source of
16 the funds solicited, accepted, or received is a foreign national but fails to conduct such inquiry.⁴⁰

³⁶ *Id.*

³⁷ *Id.*

³⁸ 2 U.S.C. § 441e(a)(1), (2); 11 C.F.R. § 110.20. A “foreign national” includes an individual who is not a citizen of the United States or lawfully admitted as a permanent resident. 2 U.S.C. § 441e(b)(2); 11 C.F.R. § 110.20(a)(3)(ii).

³⁹ 11 C.F.R. § 110.20(g) (emphasis added).

⁴⁰ *Id.* § 110.20(a)(4).

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1 1. Receipt of Contributions from Foreign Nationals

2 The Complaint argues that OFA violated 2 U.S.C. § 441e because it processed and
3 accepted contributions from foreign nationals.⁴¹ OFA contends, however, that the Complainant
4 has failed to show that OFA satisfied the knowledge requirement of 11 C.F.R. § 110.20(a)(4).⁴²
5 OFA further argues that its compliance procedures — “the same and enhanced procedures” that
6 the Commission considered in MURs 6078/6090/6108/6139/6142/6214 (Obama for America) —
7 were effective — contributions cited in the Complaint were either rejected or refunded within 30
8 days.⁴³

9 The Complaint points to contributions reportedly made by two foreign nationals and
10 several contributions that, it argues, should have raised “red flags” because of the contributor
11 identification information provided.⁴⁴ As the Commission has previously determined, however,
12 “the mere presence” of a contribution received from a foreign address, for example, “does not
13 establish reason to believe.”⁴⁵ OFA was only required “to make a ‘reasonable inquiry’ to verify
14 that the contribution[s] [are] not from a prohibited source.”⁴⁶ And here, “there is evidence that
15 the Committee made reasonable inquiries” when it informed online contributors of the Act’s
16 requirements, required contributors to certify the legality of their contributions, and reviewed the

⁴¹ Compl. at 1. Only five of the nine contributions appear to have been made by foreign nationals — specifically, by Mike McNally and Chris Walker, who were reportedly British citizens. We have no information suggesting that the remaining contributions made in the names of “Osama Bin Laden” and “Boris Noridnika” were contributions made by foreign nationals, as the Complaint provides no information that the true sources of the contributions — staff of WND.com and Erik Erickson — were foreign nationals.

⁴² Resp. at 4.

⁴³ *Id.*

⁴⁴ Compl., Attach. A ¶ 4 (Affidavit of Joseph Farah).

⁴⁵ F&LA at 14, MUR 6078/6090/6108/6139/6142/6214 (Obama for America).

⁴⁶ *Id.*; see also 11 C.F.R. § 110.20(a)(7).

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1 contributions it received.⁴⁷ These practices were effective: OFA states that it rejected three of
2 the contributions and refunded six within 30 days.⁴⁸ Accordingly, we recommend that the
3 Commission find no reason to believe that OFA violated 2 U.S.C. § 441e(a)(2) by accepting or
4 receiving contributions from foreign nationals.

5 2. Solicitation of Contributions from Foreign Nationals

6 The Complaint also asserts that OFA solicited contributions from foreign nationals when
7 it e-mailed solicitations to OsamaforObama2012@gmail.com and allowed the "Bin Laden" page
8 to be posted on OFA's website.⁴⁹ The e-mail address and the Bin Laden page, of course, were
9 created by the Complainants. And the page only received a \$3 contribution, which appears to
10 have been made by the Complainants.⁵⁰ Under these circumstances, to conserve Commission
11 resources, we recommend that the Commission dismiss the allegation that OFA violated 2
12 U.S.C. § 441e(a)(2) by soliciting contributions from foreign nationals.⁵¹

13 B. **Contributions Made in the Name of Another**

14 The Act prohibits a person from knowingly accepting a contribution in the name of
15 another.⁵² OFA states that it rejected the Noridnikova contribution and two of the three Bin
16 Laden contributions; as to the third Bin Laden contribution, OFA states that it refunded the \$5

⁴⁷ F&LA at 14-15, MUR 6078/6090/6108/6139/6142/6214 (Obama for America).

⁴⁸ See Resp. Ex. A; see also *infra* Section III.C (discussing requirements of 11 C.F.R. § 103.3(b)).

⁴⁹ Compl. at 3-4; Klein *supra* note 9.

⁵⁰ Compl. at 3-4; Klein *supra* note 9. Moreover, it is not clear that the failure to adopt measures designed to protect against *fraudulent* use of credit card contributions would necessarily cause an increase in the volume of prohibited *foreign* contributions. Indeed, if a credit card were used to make a contribution that was unauthorized—whether by a foreign or domestic person—presumably the contribution would be refunded upon notice of the theft. Accordingly, such a scheme would not be particularly effective in any event.

⁵¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁵² 2 U.S.C. § 441f.

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1 within two days of the date the contribution was made.⁵³ We therefore recommend that the
2 Commission find no reason to believe that OFA violated 2 U.S.C. § 441f by knowingly
3 accepting a contribution made in the name of another.⁵⁴

4 **C. Handling of Questionable Contributions**

5 Treasurers must “examin[e] all contributions received for evidence of illegality.”⁵⁵
6 Contributions that “present genuine questions as to whether they were made by” prohibited
7 sources may be deposited into a campaign depository or returned to the contributor.⁵⁶ But if
8 “deposited, the treasurer shall make his or her best efforts to determine the legality of the
9 contributions. The treasurer shall make at least one written or oral request for evidence of the
10 legality of the contribution. . . .”⁵⁷ If the treasurer cannot determine that a contribution is legal,
11 the treasurer must refund the contribution within thirty days of receipt.⁵⁸

12 Several of the cited contributions arguably appear suspicious because of the information
13 provided along with the contributions. The Response, however, indicates that OFA conducted a
14 reasonable inquiry into the source of those funds by examining all contributions for evidence of

⁵³ Resp. at 4, Ex. A; *see also infra* Section III.C (discussing requirements under 11 C.F.R. § 103.3(b)).

⁵⁴ In making its allegations, the sworn Complaint — supported by an affidavit — sets forth facts that taken as true would establish that the Complainant and staff of WND.com made contributions in the name of another — “Osama Bin Laden.” Compl. at 3-4. The Complainant avers that the Bin Laden contribution was made “from this fictional — deceased, but foreign — donor.” Compl., Attach. A ¶ 5 (Affidavit of Joseph Farah). The amount in violation, however, is \$23 and therefore *de minimis*. Similarly, the Complaint attaches blog posts from RedState.com, in which Erick Erickson admits that he made a \$5 contribution using a false Russian name. According to the Response, Erickson used the name “Boris Noridnikova” when making his contribution and consequently appears to have violated section 441f as well. Accordingly, we recommend that the Commission take no action with regard to Erick Erickson, Joseph Farah, and WND.com.

⁵⁵ 11 C.F.R. § 103.3(b).

⁵⁶ *Id.* § 103.3(b)(1).

⁵⁷ *Id.*

⁵⁸ *Id.* If the treasurer determines that a contribution does not appear to be illegal at the time it was received, but later discovers that it is illegal based on new evidence, the treasurer must refund the contribution within thirty days of the date on which the illegality is discovered. *Id.* § 103.3(b)(2).

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1 illegality.⁵⁹ For example, OFA conducted automated searches of its contributor database for
2 foreign addresses and required contributors with foreign addresses to provide passport
3 numbers.⁶⁰ And OFA rejected or refunded all of the questionable contributions identified in the
4 Complaint within less than 30 days of receipt.⁶¹ Furthermore, although the Commission has
5 provided guidance as to how online contributions may be made,⁶² OFA was not required to
6 implement specific anti-fraud security measures for online contributions because neither the Act
7 nor Commission regulations require such measures.⁶³

8 We are aware of no information contradicting OFA's representations; it appears to have
9 complied with the requirements of section 103.3(b). We therefore recommend that the
10 Commission find no reason to believe that OFA violated 11 C.F.R. § 103.3(b).

11 **D. Reporting of Contributions Under \$200**

12 The Act requires a treasurer to file reports identifying only those persons who make
13 contributions that exceed \$200 within the calendar year.⁶⁴ OFA therefore has no obligation to
14 disclose persons who contributed less than \$200 within a calendar year. Accordingly, we
15 recommend that the Commission find no reason to believe that OFA violated 2 U.S.C.
16 § 434(b)(3)(A).

⁵⁹ Resp. at 2.

⁶⁰ Resp. at 3-4.

⁶¹ See Resp. at 4-5, Ex. A.

⁶² See, e.g., F&LA at 3, MURs 6078/6090/6108/6139/6142/6214 (Obama for America).

⁶³ Cf. Advisory Op. 2007-30 (Chris Dodd for President, Inc.) (stating that Commission has not mandated specific procedures to verify the identity of persons making online credit card contributions in the context of the Matching Payment Act).

⁶⁴ See 2 U.S.C. § 434(b)(3)(A).

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IV. RECOMMENDATIONS

1. Find no reason to believe that Obama for America and Martin H. Nesbitt in his official capacity as treasurer violated 2 U.S.C. § 441e(a)(2) by accepting or receiving a foreign contribution;
2. Dismiss the allegation that Obama for America and Martin H. Nesbitt in his official capacity as treasurer violated 2 U.S.C. § 441e(a)(2) by soliciting a foreign contribution;
3. Find no reason to believe that Obama for America and Martin H. Nesbitt in his official capacity as treasurer violated 2 U.S.C. §§ 434(b)(3)(A), 441f and 11 C.F.R. § 103.3(b);
4. Take no action with regard to information that Erick Erickson, Joseph Farah, and WorldNet Daily, Inc. violated 2 U.S.C. § 441f;
5. Approve the attached Factual and Legal Analysis;
6. Approve the appropriate letters; and
7. Close the file.

4/22/13
Date

Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel
For Enforcement

Mark Shonkwiler
Assistant General Counsel

Jin Lee
Attorney